Office Supreme Court, U.S.
FILED
JUL 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD H. WHITE, *Petitioner,*

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

E. RICHARD LARSON*
BRUCE J. ENNIS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

RAYMOND J. KELLY
922 Elm Street
Manchester, N.H. 03101
(603) 669-7603

ALAN LINDER
ALAN CRONHEIM
NEW HAMPSHIRE LEGAL ASSISTANCE
136 North Main Street
Concord, N.H. 03301
(603) 224-3333

Counsel for Petitioner
**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

This case concerns the timeliness of a request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended [the "Fees Act"]. The questions presented are:

I. Whether a request for attorney's fees under the Fees Act which defines fees "as part of the costs" is a Fed. R. Civ. P. Rule 59(e) motion to alter or amend a judgment, or instead is procedurally subject to Rules 54(d) and 58 or is to be determined in an independent proceeding supplemental to the proceedings on the merits?

II. Whether a court may require counsel to negotiate a fee award concurrently with negotiations directed at settling the merits of a case despite the ethical conflict that such an obligation imposes on class counsel?

LIST OF THE PARTIES

The petitioner, the plaintiff-appellee below, is RICHARD H. WHITE, a resident of New Hampshire. He is the class representative in this certified class action.

The respondents, the defendants-appellants below, are the NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, and its Commissioner, BENJAMIN C. ADAMS.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF THE PARTIES	i
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION OF THIS COURT	1
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	6
I. A Request For Attorney's Fees "As Part Of The Costs" Is Subject To Rules 54(d) And 58 Of The Fed. R. Civ. P. And Is Properly Determined In An Independent Proceeding Supplemental To The Proceedings On The Merits	6
A. Since Congress authorized attorney's fees "as part of the costs" when it amended 42 U.S.C. §1988, fee requests are governed by Rules 54(d) and 58 of the Fed. R. Civ. P. which address costs and which contain no strict time limitations	6
B. Since fee requests involve independent proceedings and not a request for a modification of a judgment on the merits, fee requests are governed by no strict time limitations	18
C. Since Rule 59(e) of the Fed. R. Civ. P. addresses motions to correct a judgment with regard to matters previously presented, fee requests are not governed by the rule or by its 10-day time limitation	25
II. A Court May Not Require Simultaneous Negotiation Of The Merits And Of Fees In A Class Action Lawsuit Because Of The Ethical Conflicts Thereby Imposed On Class Counsel	37
CONCLUSION	42
APPENDIX (STATUTES AND RULES INVOLVED)	1a

TABLE OF AUTHORITIES

CASES: Page

Administrator, FAA v. *Robertson*, 422 U.S. 255 (1975) 17-18

American Family Life Assur. Co. v. *Planned Marketing Assoc., Inc.*, 389 F.Supp. 1141 (E.D.Va. 1974) 29

Anderson v. *Morris*, 500 F.Supp. 1095 (D.Md. 1980) 12

Angoff v. *Goldfine*, 270 F.2d 185 (1st Cir. 1959) 16

ASPIRA of New York, Inc. v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975) .. 14

Boaz v. *Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944) 8, 9, 31, 36

Boeing Co. v. *Van Gemert*, 444 U.S. 472 (1980) 15, 22, 32, 33

Bond v. *Stanton*, 630 F.2d 1231 (7th Cir. 1980) 12

Bradley v. *School Board of City of Richmond*, 416 U.S. 696 (1974) ..... *passim*

Brandenburger v. *Thompson*, 494 F.2d 885 (9th Cir. 1974) 24

Browder v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978) 9, 30

Chi-Mil Corp. v. *W. T. Grant Co.*, 422 F.Supp. 46 (E.D.Wis. 1976) 29

Chrapliwy v. *Uniroyal, Inc.*, 509 F.Supp. 442 (N.D.Ind. 1981) 39

Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 (1978) 17

Cleverly v. *Western Electric Co.*, 594 F.2d 638 (8th Cir. 1979) 24

Cofield v. *Atlanta*, 648 F.2d 986 (5th Cir. 1981) 16

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 33

Consor v. *Occidental Life Insurance Co. of Calif.*, 469 F.Supp. 1110 (N.D.Tex. 1979) 29

Continental Cas. Co. v. *American Fidelity & Cas. Co.*, 186 F.Supp. 173 (S.D.Ill. 1959), *aff'd*, 275 F.2d 381 (7th Cir. 1960) 29

Table of Authorities Continued

Page

Cook v. *Ochsner Foundation Hospital*, 559 F.2d 270 (5th Cir. 1977) 25

Copeland v. *Marshall*, 641 F.2d 880 (D.C.Cir. 1980) (en banc) 24

Copper Liquor, Inc. v. *Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) 24

Crooker v. *U.S. Department of Justice*, 632 F.2d 916 (1st Cir. 1980) 16

Cuneo v. *Rumsfeld*, 553 F.2d 1360 (D.C.Cir. 1977) 16

Davis v. *Parratt*, 608 F.2d 717 (8th Cir. 1979) 16

Delta Air Lines, Inc. v. *August*, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) 12, 23

Department of Banking v. *Pink*, 317 U.S. 264 (1942) 31

Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) 23-24, 25

Dietrich Corp. v. *King Resources Co.*, 596 F.2d 422 (10th Cir. 1979) 16

Ellis v. *Cassidy*, 625 F.2d 227 (9th Cir. 1980) 16

Fairmont Creamery Co. v. *Minnesota*, 275 U.S. 70 (1927) 10

F.D. Rich Co. v. *Industrial Lumber Co.*, 417 U.S. 116 (1974) 23

Fox v. *Parker*, 626 F.2d 351 (4th Cir. 1980) 27

Furtado v. *Bishop*, 635 F.2d 915 (1st Cir. 1980) 24

Gurule v. *Wilson*, 635 F.2d 782 (10th Cir. 1980) 27, 32

Hahn v. *Becker*, 551 F.2d 741 (7th Cir. 1977) 28

Hall v. *Cole*, 412 U.S. 1 (1973) 22, 23

Hannon v. *Security National Bank*, 537 F.2d 327 (9th Cir. 1976) 16

Hanrahan v. *Hampton*, 446 U.S. 754 (1980) 23

Hauben v. *Harmon*, 605 F.2d 920 (5th Cir. 1979) 29

Hirschkop v. *Snead*, 646 F.2d 149 (4th Cir. 1981), *aff'g on other grounds* 475 F.Supp. 59 (E.D.Va. 1979) 12, 27

Hughes v. *Rowe*, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) .. 17

Hutto v. *Finney*, 437 U.S. 678 (1978) 7, 10, 11, 13, 15

Table of Authorities Continued

Page

Incarcerated Men of Allen County v. *Fair*, 507 F.2d 281 (6th Cir. 1974) 14

Janicki v. *Pizza*, 501 F.Supp. 312 (N.D.Ohio 1980) 12

Johnson v. *Snyder*, 639 F.2d 316 (6th Cir. 1981) 12

Johnson v. *University of Bridgeport*, 629 F.2d 828 (2d Cir. 1980) 12, 32

Jones v. *Dealers Tractor and Equipment Co.*, 634 F.2d 180 (5th Cir. 1981) 12

Kargman v. *Sullivan*, 589 F.2d 63 (1st Cir. 1978) 22

Kincade v. *General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981) 39

King v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) 35

Knighton v. *Watkins*, 616 F.2d 795 (5th Cir. 1980) 12, 13, 31

Liberty Mutual Ins. Co. v. *Wetzel*, 424 U.S. 737 (1976) .. 32

Lindy Bros. Builders, Inc. v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) 23, 25

Lindy Bros. Builders, Inc. v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (en banc) 24

Lipscomb v. *Wise*, 643 F.2d 319 (5th Cir. 1981) 16

Lund v. *Affleck*, 587 F.2d 75 (1st Cir. 1978) 15

Lyon v. *State of Arizona*, 80 F.R.D. 665 (D.Ariz. 1978) .. 37

Maher v. *Gagne*, 448 U.S. 122 (1980) 11, 14, 15, 22, 39, 40

Maryland Tuna Corp. v. *MS Benares*, 429 F.2d 307 (2d Cir. 1970) 29

McDonald v. *Chicago Milwaukee Corp.*, 565 F.2d 416 (7th Cir. 1977) 39

Memphis Sheraton Corp. v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980) 32

Mendoza v. *United States*, 623 F.2d 1338 (9th Cir. 1980) 9, 34, 38, 39

Table of Authorities Continued

Page

Miller v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970) 15

Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) 13, 15, 22, 23

Morgan Guaranty Trust Co. v. *Third National Bank*, 545 F.2d 758 (1st Cir. 1976) 29

Munoz v. *Arizona State University*, 80 F.R.D. 670 (D.Ariz. 1978) 37

Nadeau v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978) 35

New York Gaslight Club, Inc. v. *Carey*, 447 U.S. 54 (1980) 8, 15, 17, 18, 23

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 17

Northcross v. *Board of Education of Memphis*, 412 U.S. 427 (1973) 17

Obin v. *District No. 9 of the Int'l Ass'n of Machinists*, ____ F.2d ____, 49 U.S.L.W. 2814 (8th Cir. June 11, 1981) (No. 80-1315) 20, 21, 26, 32, 33

Palmigiano v. *Garrahy*, 616 F.2d 598 (1st Cir.), *cert. denied*, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980) 15

Parker v. *Matthews*, 411 F.Supp. 1059 (D.D.C. 1976), *aff'd sub nom., Parker* v. *Califano*, 561 F.2d 320 (D.C.Cir. 1977) 14

Perez v. *Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978) 15

Perkins v. *Standard Oil Co. of California*, 399 U.S. 222 (1970) 24, 36

Prandini v. *National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) 9, 38, 39

Preston v. *United States*, 284 F.2d 514 (9th Cir. 1960) ... 16

Regalado v. *Johnson*, 79 F.R.D. 447 (N.D.Ill. 1978) 38

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 18

Reynolds v. *Coomey*, 567 F.2d 1166 (1st Cir. 1978) 15

Richerson v. *Jones*, 551 F.2d 918 (3d Cir. 1977) 32

Roadway Express, Inc. v. *Piper*, 447 U.S. 752 (1980) .. 11, 12

Table of Authorities Continued

Page

Rodgers v. *Conemough & Black Lick R.R. Co.*, 137 F.Supp. 467 (W.D.Pa. 1956) 29

Sack v. *Low*, 478 F.2d 360 (2d Cir. 1973) 29

Seshachalam v. *Creighton University School of Medicine*, 545 F.2d 1147 (8th Cir. 1976), *appeal dismissed on other grounds*, 549 F.2d 79 (8th Cir.), *cert. denied*, 433 U.S. 909 (1977) 28

Shelton v. *Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978) 39

Silk v. *Sandoval*, 435 F.2d 1266 (1st Cir. 1971) 29

Souza v. *Southworth*, 564 F.2d 609 (1st Cir. 1977) 35

Sprague v. *Ticonic National Bank*, 307 U.S. 161 (1939) ..... *passim*

Swanson v. *American Consumer Industries, Inc.*, 517 F.2d 555 (7th Cir. 1975) 32

Terket v. *Lund*, 623 F.2d 29 (7th Cir. 1980) 20, 27, 32, 33

Trustees v. *Greenough*, 105 U.S. 527 (1882) 33

Tucker v. *Reading Co.*, 335 F.Supp. 1269 (E.D.Pa. 1971) 29

United States v. *2,186.63 Acres of Land, Wasatch County, Utah*, 464 F.2d 676 (10th Cir. 1972) 29

United States v. *Dieter*, 429 U.S. 6 (1976) 9, 29

United States v. *Robinson*, 361 U.S. 220 (1960) 27

United States ex rel. Rosner v. *Commissioner, N.Y.S.D. of Corr.*, 421 F.Supp. 781 (S.D.N.Y. 1976), *modified*, 560 F.2d 84 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977) 29

Van Ooteghem v. *Gray*, 628 F.2d 488 (5th Cir. 1980), *reh. en banc pending on other grounds*, 640 F.2d 12 (5th Cir.), *premature petition for cert. on other grounds dismissed without prejudice*, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981) 12

Weinberger v. *Hynson, Westcott & Dunning*, 412 U.S. 609 (1973) 17, 25

Williams v. *Alioto*, 625 F.2d 845 (9th Cir. 1980) 27

Williams v. *Ryan*, 78 F.R.D. 364 (S.D.Ga. 1978) 39

Table of Authorities Continued

Page

FEDERAL STATUTES

Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended ..... *passim*

28 U.S.C. § 1920 17

28 U.S.C. § 1927 12

FEDERAL RULES OF CIVIL PROCEDURE

Rule 6(b) 27, 30

Rule 50(b) 30

Rule 52(b) 30

Rule 54(b) 2

Rule 54(d) ..... *passim*

Rule 58 ..... *passim*

Rule 59(b) 30

Rule 59(e) ..... *passim*

Rule 60(b) 30

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3(b) 33

Rule 4(a)(4) 30

LEGISLATIVE HISTORY

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) . *passim*

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) .... *passim*

MISC.

Advisory Committee Report on the Federal Rules of Civil Procedure, 5 F.R.D. 433 (1946) 8, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5887

RICHARD H. WHITE, *Petitioner,*

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The decision of the U.S. Court of Appeals for the First Circuit, entered on August 12, 1980, is reported at 629 F.2d 697 (1st Cir. 1980). A copy of the decision is set forth in the Joint Appendix at J.A. 92-107.

The unreported decision of the U.S. District Court for the District of New Hampshire awarding fees to petitioner, entered on August 30, 1979, is set forth at J.A. 74-80. The unreported order of the District Court denying respondents' motion to vacate the consent decree, which was entered on October 1, 1979, is set forth at J.A. 91.

JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the First Circuit was entered on August 12, 1980. On November 10, 1980, Justice Brennan signed an order extending the time for filing a petition for a writ of certiorari to and including December 10, 1980. A petition was filed on that date, and certiorari was

granted by this Court on May 18, 1981. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The federal statute involved in this case is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended. This case also involves Rules 54(b), 54(d), 58, and 59(e) of the Fed. R. Civ. P.

The statute and rules are set forth verbatim in a separate Appendix at the end of this Brief.

STATEMENT OF THE CASE

The substantive merits of this case were subject to a judgment entered in petitioner's favor on November 15, 1977, J.A. 17-26, and ultimately were resolved in a consent decree approved by the trial court on January 26, 1979, J.A. 31-32. The issues presented here arise from the subsequently filed request for attorney's fees made by petitioner's counsel under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended [hereinafter the "Fees Act" or "§ 1988"], J.A. 34-45, from the trial court's award of fees to petitioner's counsel, J.A. 74-80, and from the First Circuit's reversal of that award, J.A. 92-107.

This action was commenced in March, 1976, when petitioner, proceeding in forma pauperis and represented by counsel from New Hampshire Legal Assistance, filed a complaint alleging that respondents' procedures for processing unemployment compensation claims violated the due process clause of the Fourteenth Amendment and also violated the "when due" provision of the Social Security Act, 42 U.S.C. § 503(a)(1). J.A. 5-16. Petitioner's complaint was filed under 42 U.S.C. § 1983. J.A. 6. Jurisdiction was conferred on the district court by 28 U.S.C. § 1343(3) & (4). *Id.*

On May 11, 1976, petitioner's action was certified as a class action. J.A. 1-2, 93. Following extensive discovery and a two-day bench trial in the fall of 1977, the district court entered a

judgment on November 15, 1977 in favor of petitioner and his class, holding that respondents' administrative procedures were in violation of the "when due" provision of the Social Security Act. J.A. 17-26, 93. Because of its disposition of the statutory issue in favor of petitioner, the trial court declined to address petitioner's constitutional claim. J.A. 25.

Respondents' thereafter filed an appeal from the trial court's decision on the merits. J.A. 3, 93. While the appeal was pending, counsel for petitioner and his class and counsel for respondents initiated settlement negotiations. J.A. 62-63, 93. In response to a motion filed by respondents in the court of appeals, J.A. 29, the case was remanded "for the purpose of entertaining a consent decree," J.A. 30. During the ensuing negotiations, an attempt initially was made by respondents' counsel to settle the matter of fees along with the merits, and even to have petitioner's counsel waive attorney's fees. J.A. 75, 83-84. But, as the district court later found, "[t]hese attempts proved nugatory and finally without any mention of attorneys' fees and costs a Consent Decree was filed and approved [by the court] on January 26, 1979." J.A. 75.

Five days after the entry of the consent decree, petitioner's counsel wrote to respondents' counsel in an attempt to reach a settlement on the award of attorney's fees. J.A. 45, 84. When these settlement negotiations ultimately proved to be unsuccessful, petitioner's counsel on June 7, 1979 moved for an award of attorney's fees under the Fees Act. J.A. 34-45. Respondents' counsel objected, J.A. 46-47, and a hearing was held on August 21, 1979, J.A. 56-73. At that hearing, respondents' counsel argued that petitioner was not truly the prevailing party, J.A. 76, 94, and that the hourly rates used by petitioner's counsel in computing the fee request were too high, J.A. 71. He also contended that he had expected that the fee request would not be pursued. J.A. 68-69.

Although respondents' counsel thus argued that he had not expected the fee claim to be pursued after the entry of the consent decree on the merits, he also candidly conceded at the

fee hearing that he came to the view during the negotiations on the merits that it would have been unethical to "hold a class action hostage or consent decree hostage for a waiver of attorneys' fees." J.A. 69.[1] Counsel for respondents repeated this point at a later hearing, stating that "at the time I felt there was an ethical problem in discussion of the attorneys' fees." J.A. 88.[2]

---

[1] Although the court of appeals' decision in this case does not reflect counsel's admission, counsel did rather fully discuss the ethical conflicts in the trial court. These conflicts were first described by respondents' counsel at the fees hearing held on August 21, 1979:

> "[P]art of the problem [of] including the attorneys' fees and the consent decree was that, in a seminar that was held, it seemed to be the concensus of those present [that] you could not hold a class action hostage or consent decree hostage for a waiver of attorneys' fees.
>
> "Now, I haven't seen anything lately on that, but it became my opinion, and I was warned by my brother counsel in my office, I should not be holding the consent action hostage to attorneys' fees because I might have an ethical problem and it should not be included in the consent decree. That was his opinion. He had been through the course, and I took his opinion." J.A. 69.

[2] This statement occurred at the hearing held on October 1, 1979, to consider respondents' motion to vacate the consent decree, where counsel for the respondents again volunteered to discuss the ethical problem:

> "I would add, Your Honor, again, I may be repeating myself from the last time we were here on the question of attorneys' fees, at that time I felt there was an ethical problem in discussion of the attorneys' fees, at least towards the end when the consent decree was finally signed. [W]hat I have read and what is being held is, if the attorneys' fees are going to a nonprofit corporation, rather than to the plaintiffs, that it's wrong to hold the attorneys' fees hostage to consent decree because the Court's order goes to the plaintiff. And however the attorneys' fees go to the attorneys directly. [A]nd unlike other cases, if you hold or require an attorney in this situation to forego or withhold attorneys' fees in order for his clients to get what they wanted in the first place, from what I have read there is an ethical problem here. And that's all I want to say." J.A. 88.

Subsequent to the submissions by counsel and the arguments and admissions at the fee hearing, the district court on August 30, 1979 overruled the objections raised by respondents' counsel to the fee request by petitioner's counsel, and awarded "[r]easonable attorney's fees in the sum of $16,644.40 . . . to [petitioner's] counsel." J.A. 80.

On September 13, 1979, respondents filed a motion to vacate the consent decree, contending in part that the fee request by petitioner's counsel had caught respondents "by surprise." J.A. 81-82. After a hearing at which respondents' counsel again admitted the ethical problems surrounding concurrent consideration of fees and of the merits, see n.2 *supra*, the court rejected respondents' motion in a one-page order. J.A. 91, 95. Respondents then perfected their appeals both from the award of fees and from the denial of the motion to vacate, J.A. 95, and the appeals were consolidated, *id.*

On their appeal to the First Circuit, respondents argued for the first time that the fee request filed under the Fees Act by petitioner's counsel actually had been a motion to alter or amend judgment, and that it thus was time-barred by the 10-day limitation in Rule 59(e) of the Fed. R. Civ. P. J.A. 96. The First Circuit agreed, and thereby reversed the trial court's fee award. J.A. 92-107.

In order to apply Rule 59(e) to petitioner's fee request, the First Circuit characterized a fee award as an integral part of the substantive judgment on the merits, which in this instance was obtained through a consent decree: "We hold that a fees award under 42 U.S.C. § 1988 is a matter to be raised and determined prior to entry of final judgment, *and* that, at the latest, a fees request may be presented after judgment only within such time limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e)." J.A. 95 (emphasis added).

In applying Rule 59(e) to a fee request, the First Circuit explicitly rejected the statutory definition of fees in the Fees Act

"as part of the costs." J.A. 100-103. The court of appeals also held that, even if not a part of the costs, a fee award under the statute is not sufficiently separate and independent from the merits to be considered in an independent proceeding apart from and subsequent to the proceedings on the merits. J.A. 103-104.

The First Circuit also ruled that, even in cases that are being settled by agreement of the parties, the issue of fees should be negotiated simultaneously with the issues on the merits: "Nor in a consent decree context do we see anything wrong with *requiring* the parties to face up to the issue of fees in their settlement negotiations." J.A. 106 (emphasis added). Perceiving no ethical conflicts flowing from this requirement, the First Circuit added that it did not necessarily "suggest that an attorney in the course of settlement negotiations need, or in every case may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree." J.A. 107.

Because of the First Circuit's erroneous application of Rule 59(e) to a request for attorney's fees, counsel for petitioner filed a petition for a writ of certiorari with this Court on December 10, 1980. The petition was granted on May 18, 1981. J.A. 108.

SUMMARY OF ARGUMENT

The issues in this case, involving the timeliness of a request for attorney's fees, leave little room for dispute. Not only does the Fees Act define fees "as part of the costs," but this Court forty years ago in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 170 (1939), held that fees were so separate from the merits that they were to be determined in "an independent proceeding supplemental to the original proceeding." The propriety of this procedure was confirmed in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974), where this Court held that it would have been wrong for the trial court to delay consideration and implementation of a judgment on the merits in order to address the separate matter of fees.

1. By applying Rule 59(e) of the Fed. R. Civ. P. — which governs motions to alter or amend a judgment — to a request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, the First Circuit below erred in three respects. It disputed Congress' definition of fees "as part of the costs," a definition that cannot be viewed as mere surplusage. Second, it disregarded entirely this Court's holding in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 170 (1939), that a request for fees is "not a request for a modification of the original decree," and hence cannot be subject to a 10-day rule. Finally, and most basically, it lifted Rule 59(e) entirely out of its intended context of allowing courts to reconsider matters previously before them so as to be able to correct errors of law. In fact, through its failure to examine both the intent and the usual application of Rule 59(e), the First Circuit became the only court of appeals to apply Rule 59(e) to a request for fees under the Fees Act.

a. In enacting the Fees Act, Congress defined fees "as part of the costs." These are not empty words. In *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court held that Congress' chosen definition of fees as part of the costs was sufficient to abrogate the Eleventh Amendment immunity claimed by the state defendants there from an award of fees. Based on the recognition that the Fees Act represented "Congress' decision to authorize an award of attorney's fees as an item of costs," 437 U.S. at 696, three courts of appeals have now held that the cost item of fees is, like other items of costs, subject only to Rules 54(d) and 58, rules which govern costs generally and which impose no strict time limits on requests therefor. These courts of appeals' decisions are surely correct. Fees, like other items of costs, are usually awarded to counsel after judgment. In fact, the only ways that fees differ from other items of costs arise from clarifications that Congress itself had to make in view of its definition that fees were part of the costs, *i.e.*, Congress in enacting the Fees Act specified that the cost item of fees would be awarded by the courts, and would be awarded under the dual standard which distinguishes prevailing plaintiffs from prevailing defendants. Congress' defini-

tion cannot be avoided. Just as the words "or proceeding" cannot be read out of an analogous fee-shifting statute, see *New York Gaslight Club, Inc.* v. *Carey*, 477 U.S. 54 (1980), the words "as part of the costs" cannot be read out of the Fees Act.

b. Just as fee requests under the Fees Act are not subject to a 10-day time limit under Rules 54(d) and 58, fee requests in general cannot be subjected to a 10-day time limit under this Court's decision in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). At issue in *Sprague* was the timeliness of a fee request filed several years after judgment. Reaching its decision under the then-applicable timeliness rules of equity — the predecessors of Rules 59 and 60 of the Fed. R. Civ. P. — the Court reversed the First Circuit and held that since a request for fees involves "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals — that it came after the end of the term at which the main decree was entered and therefore too late — falls." 307 U.S. at 170. The truly independent and supplemental nature of a fee determination is illustrated by the fact that fee awards ordinarily are destined for counsel, by the fact that there is an entire body of law governing the manner in which fees are to be computed, and by the fact that fee determinations often require evidentiary hearings. As Justice Frankfurter wrote for the Court in *Sprague*, "the inquiry [is] a collateral one, having a distinct and independent character." 307 U.S. at 169.

c. The origin and intended use of Rule 59(e) belie the rule's application to a request for fees. The Advisory Committee Report, addressing the adoption of Rule 59(e), states that subdivision (e) "has been added to care for a situation such as that arising in *Boaz* v. *Mutual Life Ins. Co. of New York*, C.C.A. 8th, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." 5 F.R.D. 433, 476 (1946). The situation that arose in *Boaz* was "the absence of express authority [for a trial court] to correct its errors," specifically

the error of dismissing a case without prejudice rather than with prejudice. 146 F.2d at 322. The power asserted in *Boaz* was the trial court's "inherent power to correct its error," specifically to change the dismissal to one with prejudice. *Id.* Although the Eighth Circuit in *Boaz* affirmed the power of the trial court "to reconsider and correct the action taken," *id.*, there still was no rule authorizing trial courts to reconsider and correct their errors. That authorization was provided by Rule 59(e). Subsequent to its adoption, Rule 59(e) has consistently been used with regard to motions for rehearing or for reconsideration of matters previously presented to a court on which the court allegedly erred as a matter of law. See generally *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978); *United States* v. *Dieter*, 429 U.S. 6 (1976). Given the background and ordinary application of Rule 59(e), it cannot be applied to a request for attorney's fees which seeks no reconsideration of the merits, which merely seeks what is due because of the judgment on the merits, and which involves an independent proceeding supplemental to the original proceeding.

2. In the course of erroneously applying its 10-day time limit to the filing of fee requests, the First Circuit committed yet another error by holding that there was nothing wrong with requiring simultaneous negotiation of the merits and of fees. What is wrong with this decision is the ethical dilemma that it imposes on class counsel who have an interest of their own in any fee award. Because of this ethical problem, the Third Circuit has followed a wiser course by requiring its trial courts to insist on settlement of the merits separate from any subsequent discussion about fees. *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977); see also *Mendoza* v. *United States*, 623 F.2d 1338, 1352-1353 (9th Cir. 1980). The First Circuit's decision not only imposes an unwarranted unethical dilemma on counsel, but also runs afoul of this Court's admonition in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974), that it would be wrong for trial courts to delay the implementation of a remedy on the merits "in order to resolve the question of fees simultaneously."

ARGUMENT

I. A Request For Attorney's Fees "As Part Of The Costs" Is Subject To Rules 54(d) And 58 Of The Fed. R. Civ. P. And Is Properly Determined In An Independent Proceeding Supplemental To The Proceedings On The Merits

Rule 59(e) was intended to apply and has commonly been applied to a motion which seeks reconsideration of a judgment with regard to matters previously submitted so as to permit a court to alter or amend its allegedly erroneous ruling. Thus, even regardless of the law which does govern the timeliness of fee requests, Rule 59(e) cannot and does not apply to a request for attorney's fees. Here, however, there is other law — established by this Court which has held that fees are to be determined in an independent proceeding supplemental to the proceedings on the merits; and established by Congress which has defined fees as part of the costs.

A. Since Congress Authorized Attorney's Fees "As Part Of The Costs" When It Amended 42 U.S.C. § 1988, Fee Requests Are Governed By Rules 54(d) And 58 Of The Fed. R. Civ. P. Which Address Costs And Which Contain No Strict Time Limitations.

When Congress amended 42 U.S.C. § 1988 by enacting the Fees Act, Congress expressly authorized attorney's fees to be awarded and collected "as part of the costs." Although this language is unequivocal on its face, the point was reiterated in the legislative history accompanying the Fees Act specifically with regard to government defendants: quite simply, governments are to be assessed "attorneys' fees, like other items of costs." S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976) (footnote omitted).[3]

---

[3] The omitted footnote contains a single yet significant citation: *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927). See S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 n.6 (1976). *Fairmont Creamery*, which involved the assessment of *costs*, is discussed extensively in *Hutto* v. *Finney*, 437 U.S. 678, 694-698 (1978).

Relying heavily upon Congress' chosen language, this Court in *Hutto* v. *Finney*, 437 U.S. 678 (1978), held that the definition of fees as an item of costs was sufficient to override the states' Eleventh Amendment immunity from monetary liability. Not only did the Court in *Hutto* extensively distinguish "liability for prelitigation conduct" from the "expenses incurred in litigation," 437 U.S. at 695,[4] but the Court thoroughly recognized that Congress in 1976 of course had been free to "amend its definition of taxable costs." 437 U.S. at 696. And that is precisely what Congress did. Enacting the Fees Act represented "Congress' decision to authorize an award of attorney's fees as an item of costs." 437 U.S. at 697.

In view of the express language of the Fees Act, and based on this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978), three courts of appeals have now held that requests for fees as an item of costs are subject to the procedural rules governing costs, Rules 54(d) and 58 of the Fed. R. Civ. P.[5]

---

[4] Distinguishing between monetary liability for prelitigation conduct, on one hand, and expenses of litigation, on the other, this Court in *Hutto* v. *Finney*, 437 U.S. 678 (1978), repeatedly referred to fees as a part of the costs and to fees as incidental and ancillary to the relief on the merits. This extended discussion in *Hutto* was quoted at length by the Court in *Maher* v. *Gagne*, 448, U.S. 122, 131-132 n.14 (1980), a case in which a request for fees "as part of the costs" under the Fees Act was determined in an independent proceeding subsequent to resolution of the merits through a settlement.

[5] Because of respondents' previous submissions in this case, it needs to be pointed out that the question in this case is *not* whether a statute or rule which authorizes "costs" should be construed to include fees. See, *e.g.*, *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980). Quite to the contrary, the statute invoked in this case — the Fees Act — already defines fees "as part of the costs." The question here thus is simply whether a request for fees as an item of costs *under the Fees Act* is governed for procedural purposes by Rules 54(d) and 58, rules which govern the procedural disposition of costs without qualification.

Even if the respondents' submission — which is not presented here — were somehow relevant, the purposes of the Fees Act would

These rules impose no strict time limitations on the filing of fee requests, and, in fact, Rule 58 directs that "[e]ntry of the judgment shall not be delayed for the taxing of costs." The Fifth Circuit initially applied these rules, and rejected the application of Rule 59(e) to a fee request, in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), a decision which was followed in *Jones* v. *Dealers Tractor and Equipment Co.*, 634 F.2d 180 (5th Cir. 1981). The Sixth Circuit agreed in *Johnson* v. *Snyder*, 639 F.2d 316 (6th Cir. 1981), as did the Seventh Circuit in *Bond* v. *Stanton*, 630 F.2d 1231 (7th Cir. 1980).[6]

---

have to be considered. For example, in *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), where this Court held that the authorization of "costs" in 28 U.S.C. §1927 could not be interpreted to encompass fees, the Court stressed that a contrary construction would be inconsistent with the remedial purposes of fee-shifting statutes such as the Fees Act. On the other hand, as Justice Powell, the author of the majority opinion in *Roadway Express*, observed in his concurring opinion in *Delta Air Lines, Inc.* v. *August*, 101 S.Ct. 1146, 1156 n.2, 67 L.Ed.2d 287, 300 n.2 (1981), the word "costs" in Rule 68 of the Fed. R. Civ. P. should encompass fees since such a construction is entirely consistent with the purposes of fee-shifting statutes such as the Fees Act.

In the final analysis, however, *Roadway Express* and *Delta Air Lines* are inapposite here since the statute invoked by petitioner — the Fees Act — already defines and authorizes fees "as part of the costs."

[6]This position, rejecting the application of Rule 59(e) to a fee request, was also adopted by the Fifth Circuit in *Van Ooteghem* v. *Gray*, 628 F.2d 488 (5th Cir. 1980), *reh. en banc pending on other grounds*, 640 F.2d 12 (5th Cir.), *premature petition for cert. on other grounds dismissed without prejudice*, 101 U.S. 2031, 68 L.Ed.2d 334 (1981).

This same conclusion has been reached by the trial courts in *Janicki* v. *Pizza*, 501 F.Supp. 312 (N.D.Ohio 1980), and *Anderson* v. *Morris*, 500 F.Supp. 1095 (D.Md. 1980). The only trial court decision disagreeing with this conclusion under the Fees Act, *Hirschkop* v. *Snead*, 475 F.Supp. 59 (E.D.Va. 1979), a decision relied on extensively by the First Circuit in this case, was not ruled upon on appeal, 646 F.2d 149 (4th Cir. 1981).

The correctness of these decisions is established not only by the language of the Fees Act and by this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978), but also by the similarities between fees and other items of costs. Additionally, the fact that Congress clarified the manner in which it wanted the cost item of fees to be awarded further demonstrates that Congress intended fee awards to be part of the costs.

Undoubtedly the strongest similarity between fees and other items of costs is the timing of their availability: both ordinarily are available only after a resolution on the merits. As the Fifth Circuit observed in its seminal decision in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), because attorney's fees "may be awarded only to prevailing parties . . . attorney's fees under section 1988 will ordinarily be sought only after litigation." 616 F.2d at 797. Accordingly, a fee request "is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks *what is due because of the judgment.*" *Id.* (emphasis added).

This judicial recognition that fees ordinarily are available and hence are sought after a resolution on the merits[7] finds explicit support in the legislative history of the Fees Act. The House Report, addressing the stage at which a party may be deemed to have prevailed, expressly distinguished between

---

[7]The word "ordinarily" is used in the text because there is one limited exception under which fees and other items of costs may be awarded prior to a final resolution on the merits. Specifically, under the rule established in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974), and in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), fees and other items of costs may be awarded pendente lite incident to the final disposition of interim matters. This rule, along with *Bradley* and *Mills*, were cited with approval in the House and Senate Reports accompanying the Fees Act. See H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 8 (1976); S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976).

termination of the litigation through a consent decree and the subsequent availability of fees:

> "If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County* v. *Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker* v. *Matthews*, 411 F.Supp. 1059 (D.D.C. 1976); *Aspira [sic] of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975)." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976).[8]

The same distinction, between termination of the litigation and the subsequent availability of fees, was made in the Senate Report and quoted with approval by this Court in *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980):

> "The fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' S.Rep. No. 94-1011, p.5 (1976)."

A second and perhaps even more telling similarity between fees and other items of costs is the fact that they usually are sought by and awarded to, not the parties, but *counsel*. This

---

[8] The consent decrees in two of the cases relied on in the House Report, similar to the consent decree here, addressed and resolved the merits of the litigation without any reference to attorney's fees. *Incarcerated Men of Allen County* v. *Fair*, 507 F.2d 281 (6th Cir. 1974), *aff'g* 376 F.Supp. 483 (N.D.Ohio 1973); *ASPIRA of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). The consent decree in the third case reserved the fee issue for later resolution by the court. *Parker* v. *Matthews*, 411 F.Supp. 1059 (D.D.C. 1976), *aff'd sub nom., Parker* v. *Califano*, 561 F.2d 320 (D.C.Cir. 1977). In either situation a subsequent award of fees is appropriate.

practice has been repeatedly recognized in the fee decisions rendered by this Court.[9] In fact, consistent with this practice, the fee award made by the trial court in this case was made "to [petitioner's] counsel." J.A. 80.[10]

This practical reality about the direct recipient of the cost item of fees also finds express recognition in the legislative history of the Fees Act. The Senate Report, for example, explicitly states that "*counsel* for prevailing parties *should be paid*, as is traditional with attorneys compensated by a fee paying client, 'for all time reasonably expended on a matter.'" S.Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976) (emphasis added) (citation omitted). In fact, the need for the Fees Act

---

[9]See, *e.g.*, *Maher* v. *Gagne*, 448 U.S. 122, 126 (1980) where fees were awarded after settlement on the merits to "respondent's counsel"; *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 70-71 n.9 (1980), where fees were held appropriate across-the-board for "public interest groups"; *Hutto* v. *Finney*, 437 U.S. 678, 693 (1978), where appellate fees were ordered to be paid "to counsel for the prevailing parties."

In antitrust and securities litigation, fees also are paid directly to counsel. See, *e.g.*, *Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

[10]The trial court's award to counsel was also consistent with the First Circuit's repeated recognition of the fact that fee awards are to be paid directly to counsel or to their public interest organizations. See, *e.g.*, *Palmigiano* v. *Garrahy*, 616 F.2d 598 (1st Cir.) *cert. denied*, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980) (ACLU's National Prison Project); *Lund* v. *Affleck* 587 F.2d 75 (1st Cir. 1978) (Rhode Island Legal Services); *Perez* v. *Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978) (Puerto Rico Legal Services); *Reynolds* v. *Coomey*, 567 F.2d 1166 (1st Cir. 1978) (NAACP Legal Defense Fund).

The reason for this practice — in situations in which the prevailing party is represented without fee (as is the case here) or for a nominal fee — is to prevent windfalls to non-fee paying plaintiffs. In accord with this reasoning, the Fifth Circuit more than a decade ago in *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1970), specifically directed "that the fees allowed are to reimburse and com-

was premised on "evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 3 (1976). Designed to remedy this problem by providing a financial incentive to lawyers, the Fees Act was enacted to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." *Id.* at 9.

Aware of the basic characteristics shared by fees and by other items of costs, Congress in two respects clarified the manner in which it wanted the cost item of fees to be awarded.[11] First, although Rule 54(d) states that costs "may be taxed by the clerk," Congress overrode this partial dele-

---

pensate for legal services rendered and will not go to the litigants, named or class."

Entirely consistent with this reasoning is the judicial denial of fees to nonlawyer *pro se* litigants on the ground that fee awards were never intended to provide a windfall to parties. See *Cofield* v. *Atlanta*, 648 F.2d 986 (5th Cir. 1981); *Cooker* v. *U.S. Department of Justice*, 632 F.2d 916 (1st Cir. 1980); *Davis* v. *Parratt*, 608 F.2d 717 (8th Cir. 1979); *Hannon* v. *Security National Bank*, 537 F.2d 327 (9th Cir. 1976). Fees, however, have been awarded to attorneys who represented themselves as parties. See *Ellis* v. *Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C.Cir. 1977).

Also consistent with this reasoning is the judicial recognition that attorneys themselves have standing to appeal from a denial of fees. *Lipscomb* v. *Wise*, 643 F.2d 319 (5th Cir. 1981); *Dietrich Corp.* v. *King Resources Co.*, 596 F.2d 422 (10th Cir. 1979); *Preston* v. *United States*, 284 F.2d 514 (9th Cir. 1960); *Angoff* v. *Goldfine*, 270 F.2d 185 (1st Cir. 1959).

[11] The clarifications made by Congress in enacting the Fees Act are fully consistent with the costs provision in Rule 54(d), which states at the outset: "Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed. . . ." Fed. R. Civ. P. Rule 54(d).

gation[12] by allowing fees to be awarded only by "the court." Second, although both Rule 54(d) and the Fees Act make items of costs available to the "prevailing party," Congress incorporated into the Fees Act a dual standard under which counsel for prevailing plaintiffs are ordinarily entitled to an award of fees whereas their winning adversaries can be awarded fees only if the litigation was frivolous, unreasonable or without foundation.[13] In other words, Congress simply assured that the fees available "as part of the costs" would be awarded by the courts under the dual standard.

In the final analysis, there simply is no escape from Congress' chosen definition of fees "as part of the costs."[14] Just as

---

[12] The delegation to clerks of court — even aside from the effect of the Fees Act — is not exclusive. First, the use of the word "may" in Rule 54(d) indicates that the delegation is discretionary not mandatory; and any award of costs by a clerk in any event is reviewable by "the court." Second, 28 U.S.C. §1920, which itemizes various statutory costs, authorizes the allowance thereof either by a "judge or clerk." Finally, the item of costs listed in 28 U.S.C. §1920(6), the "[c]ompensation of court appointed experts," etc., is peculiarly within the authority of the courts.

[13] That part of the dual standard which makes fees ordinarily available when a plantiff prevails was initially articulated in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and has been followed consistently thereafter, see, *e.g., New York Gaslight Club Inc.* v. *Carey*, 447 U.S. 54, 63, 68 (1980); *Northcross* v. *Board of Education of Memphis*, 412 U.S. 427, 428 (1973). The defendants' side of the dual standard was set forth in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421-422 (1978); see also *Hughes v., Rowe*, 101 S.Ct. 173, 178, 66 L.Ed.2d 163, 172 (1980). There is no question that a similar duel standard was expressly incorporated into the Fees Act. See H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 6 (1976); S.Rep. No. 94-1011, 94th Cong., 2d Sess., 4 (1976).

[14] As this Court has repeatedly observed, it is a "well settled rule of statutory construction that all parts of a statute, if at all possible are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973), quoted with approval in *Administrator, FAA* v.

the words "or proceeding" could not be read out of the fee authorization in Title VII, see *New York Gaslight Club Inc.* v. *Carey*, 447 U.S. 54 (1980), the words "as part of the costs" cannot be excised from the Fees Act. Since Congress expressly intended fees to be awarded as part of the costs, fee requests are governed by Rules 54(d) and 58 of the Fed. R. Civ. P., rules which address costs and which contain no strict time limitations.

B. Since Fee Requests Involve Independent Proceedings And Not A Request For A Modification Of A Judgment On The Merits, Fee Requests Are Governed By No Strict Time Limitations

Although Congress' definition of fees as part of the costs is dispositive of the timeliness issue in this case, there is a second and equally compelling reason for reversing the First Circuit's decision in this case. This second reason arises from the fact that a fee request is not a request for a modification of the judgment on the merits, a reality recognized in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), where this Court rejected a timeliness claim identical to that adopted by the First Circuit below.

At issue in *Sprague* was the power of a district court to award attorney's fees as part of the "costs as between solicitor and client," 307 U.S. at 165, 166, 167, 168, 169, where the fee request had been filed several years after entry of the mandates on the merits in the case.[15] In the defendant's view and

---

Robertson, 422 U.S. 255, 261 (1975). See also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used").

[15] An initial issue in *Sprague* was whether the prevailing plaintiff who had produced a common benefit but not an identifiable common fund was entitled to an equitable award of fees. Addressing this issue, the Court conceded that the non-class action plaintiff "neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate." 307 U.S. at

in the First Circuit's view, the fee request had been untimely both because fees were not mentioned in the earlier mandates on the merits and because the then-applicable rules of equity allowed a final decree to be amended only by a motion filed during the term of court of its entry. Rejecting these arguments, and reversing the First Circuit, the Court initially explained that the matter of fees "was not directly in issue in the original proceedings," that plaintiff's "failure to ask" for such fees during the proceedings on the merits could not be construed as "an implied waiver," that the availability of fees is "contingent upon the exigencies of equitable litigation," and that in any event "'the inquiry [is] a collateral one, having a distinct and independent character.'" 307 U.S. at 168-169, (footnote and citation omitted). This Court also squarely held that a fee request is not a request for modification of a substantive decree on the merits:

> "Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals — that it came after the end of the term at which the main decree was entered and therefore too late — falls." 307 U.S. at 170.

Although the Court reached this decision under the then-existing rules of equity, the decision would have been the same under Rule 59, for, as the Court noted, the timeliness rules pertaining to terms of court under the rules of equity had been replaced by similar timeliness requirements in Rules 59 and 60 of the new Federal Rules of Civil Procedure. 307 U.S. at 169 n.9. Under either set of rules, as Justice Frankfurter concluded in his opinion for the Court, a fee request is not a motion to alter or amend a judgment. Instead, the inquiry is a collateral one, having a distinct and independent character.

---

166. Nonetheless, through "the consequences of *stare decisis*," her litigation did establish claims which might be asserted by other people, and it thus was "for the benefit of others." 307 U.S. at 167. Accordingly, plaintiff was entitled to fees as a matter of equity.

Relying on this Court's decision in *Sprague*, the Eighth Circuit last summer recognized that all fee requests, whatever their bases, are distinct and independent from the merits. As the Eighth Circuit concluded in that case, *Obin* v. *District No. 9 of the Int'l Assn'n of Machinists*, ___ F.2d ___, ___ (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 17), a multicount case where the fee request was based both on Title VII and on the bad faith exception to the American Rule, a uniform adherence to *Sprague* is necessary:

> "From both a policy and a legal standpoint, therefore, a claim for attorney's fees should be treated as a matter collateral to and independent of the merits of the litigation. Accordingly, the timeliness of a claim for fees should be governed by procedural rules that reflect the collateral and independent nature of the claim rather than by rules, such as the ten-day provision of Rule 59(e), that relate to the merits of the action."

In reaching this decision, not only did the court of appeals properly defer to this Court's decision in *Sprague*,[16] but the Eighth Circuit also correctly relied on the distinct and independent character of fee determinations in general. *Cf. Terket* v. *Lund*, 623 F.2d 29, 33 (7th Cir. 1980) (since an "award of attorneys' fees under § 1988 is a decision distinct from the

---

[16] Apart from the deference paid by the Eighth Circuit to this Court's decision in *Sprague*, the Eighth Circuit nonetheless was of the view that fee requests should be submitted and determined fairly quickly after the entry of judgment, and even suggested that trial courts should adopt local rules encouraging fee requests to be filed within 21 days of the entry of judgment. *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, ___, ___ (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 17, 20). Although we do not dispute the need for a uniform procedural approach to fee requests, we submit that the 21-day rule suggested by the Eighth Circuit is short-sighted not only because it raises the same post-judgment problems and imposes the same ethical conflicts caused by the First Circuit's decision in the instant case, see discussion at 33-41, *infra*, but also because it fails to recognize that a fee request is "con-

decision on the merits," a separate "notice of appeal specifying an appeal from the order awarding attorneys' fees is required"). This distinct character, as well as the nature of the independent proceeding necessary to make the fee determination, are readily apparent from the manner in which fees actually are assessed both under fee-shifting statutes and in common fund situations.[17]

---

tingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal place such a claim in much better perspective than it would have been at an earlier stage." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 168 (1939).

In our view, the only time limitation that could be applicable to a fee request is a flexible one flowing from the equitable doctrine of laches, a doctrine which would allow a fee request to be denied where the request was unreasonably delayed and where the delay caused prejudice to the defendant. Here, where fee negotiations were initiated by petitioner's counsel five days after the entry of the consent decree and where respondent's counsel fully understood that it would have been unethical to negotiate fees as part of the consent decree, see the Statement of the Case at 3-5 *supra*, there was neither delay nor prejudice, and laches thus is inapplicable.

[17] As is set forth in the text and illustrated through the cases cited in nn. 18-21, *infra*, both the character of fee determinations and the nature of the independent proceedings necessary to make the determinations are virtually identical whatever the basis of the fee request may be, *e.g.*, fee-shifting statute, common fund, bad faith. This is so in part because of the large body of law that has been developed to govern fee determinations in general. It also reflects the fact that fee requests increasingly are made on a variety of grounds. See, *e.g.*, *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___ (8th Cir. June 11, 1981) (No. 80-1315).

Obvious as the foregoing may seem, respondents' previous submissions in this case, suggesting that the decision in *Sprague* should be limited to fee determinations under the common fund theory, deserve at least a short rejoinder here. Most basically, any suggestion that there must be a litigation-created identifiable pool of money from which fees will be paid to counsel for the prevailing plaintiff with no adverse monetary consequences to the losing defendant be-

First, as we pointed out at 13-16, *supra*, fees ordinarily are awarded to counsel after a resolution on the merits where the resolution either produces a prevailing party under a fee-shifting statute or produces a common fund. In other words, the initial determination that there is a prevailing party or some kind of common fund is both prerequisite to, and part and parcel of, the distinct and independent inquiry which must be made into the availability and amount of fees. To be sure, this initial determination flows from the merits of the case,[18] but

---

fore *Sprague* may be invoked is a suggestion which widely misses the mark. *Sprague* itself belies such a suggestion, for the plaintiff there "neither purported to sue for a class nor formally established by litigation a fund availble to the class." 307 U.S. at 166. Accordingly, on remand the fees were assessed directly against the defendant bank to the conceded financial detriment of the bank and its unsecured creditors. See 28 F.Supp. 229 (D.Me. 1939), *aff'd*, 110 F.2d 174 (1st Cir. 1940). Indeed, the First Circuit still recognizes that there is no need for there to be an actual common fund in order to award fees under the common fund theory. *Kargman* v. *Sullivan*, 589 F.2d 63 (1st Cir. 1978). Even more compelling is *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970), where the Court held that counsel for plaintiffs were entitled to fees to be paid by defendants under the common fund theory despite the fact "that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid." See also *Hall* v. *Cole*, 412 U.S. 1 (1973); *cf.*, *Boeing co.* v. *Van Gemert*, 444 U.S. 472 (1980) (even where there is an identifiable common fund, fees may be assessed against the unclaimed portions of that fund to the financial detriment of the losing defendant).

Interesting or not, the identity of the financial source nonetheless is beside the point. The fact of the matter is that the entire thrust of the timeliness decision in *Sprague* focuses on the distinct and independent character of a fee determination. Regardless of the basis of a fee request, the nature of the inquiry remains the same: distinct and independent from the rights adjudicated on the merits.

[18] This initial resolution of whether a party has sufficiently prevailed under a fee-shifting statute or has sufficiently produced a common fund, so as to entitle counsel to an award of fees, is governed by a body of law that itself is distinct and independent from the law governing the rights adjudicated on the merits. With regard to this

nothing in a fee request permits reconsideration of, or in any way alters or affects, the rights that have been already adjudicated or otherwise resolved on the merits. Only after resolution on the merits has been achieved does the inquiry into the fees for counsel begin.

Second, in determining the amount of fees — again, both under fee-shifting statutes and in common fund situations — the courts are required to follow the fairly specific guidelines which govern fee computation. As Justice Powell pointed out in his concurring opinion in *Delta Air Lines, Inc.* v. *August*, 101 S.Ct. 1146, 1156 n.3, 67 L.Ed.2d 287, 300, n.3 (1981), the commonly followed lodestar method of fee computation[19] re-

---

determination under fee-shifting statutes, see, *e.g.*, *Maher* v. *Gagne*, 448 U.S. 122 (1980) (counsel are entitled to fees where the plaintiff prevails through an out-of-court settlement); *New York Gaslight Club Inc.* v. *Carey*, 447 U.S. 54 (1980) (counsel are entitled to fees under Title VII where the plaintiff prevails through state administrative and judicial proceedings); compare, *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) (counsel are not yet entitled to fees where the plaintiffs prevailed only on procedural matters). Criteria affecting this determination under the Fees Act are set forth in detail in the House and Senate Reports accompanying the Fees Act, H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 6-9, (1976); S.Rep. No. 94-1011, 94th Cong., 2d Sess., 3-6 (1976). With regard to this determination under the common fund theory, see, *e.g.*, *Hall* v. *Cole*, 412 U.S. 1 (1973) (counsel are entitled to fees where a union member plaintiff confers a benefit on the union and its members); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (counsel are entitled to fees where stockholder plaintiffs prove a violation of the securities laws even though the suit does not produce any monetary recovery); compare, *F.D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974) (counsel are not entitled to fees where a Miller Act plaintiff produces an insubstantial common benefit).

[19] The lodestar method of fee computation, which is commonly used by nearly all district courts, was initially adopted by the Third Circuit in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), and followed immediately thereafter by the Second Circuit in *Detroit* v. *Grinnell*

quires courts to consider the hours expended times reasonable billing rates — a process which provides the resulting "lodestar" sum — and thereafter to adjust the lodestar in view of various contingency and quality factors.[20] It is this process, this distinct and independent inquiry, which ultimately provides the resulting fee award.

Third, the inquiry necessitated by a fee request is often, as this Court has recognized, "a matter of some complexity" which ordinarily involves "the taking of evidence and briefing." *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974). See also *Perkins* v. *Standard Oil Co. of California*, 399 U.S. 222, 223 (1970), where the Court held that appellate fees should be awarded by trial courts "after hearing evidence as to the nature and extent of the services rendered." Indeed, the very fact that a separate hearing often

---

Corp., 495 F.2d 448 (2d Cir. 1974). Its use has been imposed on the trial courts not only in the Second and Third Circuits but also in the First Circuit, see *Furtado* v. *Bishop*, 635 F.2d 915 (1st Cir. 1980), and in the District of Columbia Circuit, see *Copeland* v. *Marshall*, 641 F.2d 880 (D.C.Cir. 1980) (*en banc*). All other courts of appeals either encourage or permit its use. See, *e.g.*, *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980); *Cleverly* v. *Western Electric Co.*, 594 F.2d 638 (8th Cir. 1979); *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974).

The most complete descriptions of the lodestar method appear in *Copeland* v. *Marshall*, *supra*, a Title VII fees decision; in *Furtado* v. *Bishop*, *supra*, a Fees Act fees decision; and in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (*en banc*) (*"Lindy II"*), a common fund fees decision.

[20] Unlike the criteria governing the calculation of the lodestar sum, several of the criteria encompassed within the contingency and quality factors — *e.g.*, the difficulty of the case and the novelty of the issues — do necessitate a glance back at the merits of the case. See cases cited in n.19, *supra*. This backwards look however, does not involve any reconsideration of, or have any effect upon, the rights already adjudicated or otherwise resolved on the merits. See n.18 and accompanying text, *supra*.

is held,[21] as was the case here, J.A. 56-73, provides considerable support for the conclusion that a fee request involves an independent proceeding supplemental to the original proceeding.

Because of the foregoing characteristics which distinguish fee determinations from a resolution on the merits of a lawsuit, and regardless of whether fees are assessed as part of the costs under a fee-shifting statute or as part of the costs as between solicitor and client under the common fund theory, the fee determination inquiry remains distinct and independent from the rights adjudicated on the merits. In both events or in either event, as Justice Frankfurter concluded for the Court forty years ago in *Sprague*, a fee determination involves "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree." 307 U.S. at 170.

C. Since Rule 59(e) of the Fed. R. Civ. P. Addresses Motions to Correct a Judgment With Regard to Matters Previously Presented, Fee Requests Are Not Governed By the Rule Or By Its 10-Day Time Limitation

In its decision below, not only did the First Circuit dispute Congress' definition of fees "as part of the costs"[22] and dis-

---

[21] As a general rule, hearings on fee requests are provided if requested. See, *e.g.*, *Cook* v. *Ochsner Foundation Hospital*, 559 F.2d 270, 273 (5th Cir. 1977); *Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 472 (2d Cir. 1974); *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitory Corp.*, 487 F.2d 161, 169 (3d Cir. 1973).

[22] The First Circuit effectively removed the phrase "as part of the costs" from the Fees Act on the ground that the court did "not find it clear" that Congress meant what it said. J.A. 101. Not mentioned by the First Circuit was the "well settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973). See n.14, *supra*.

In any event, the First Circuit sought to overcome the language of the Fees Act and controlling precedent by pointing out three alleged

regard entirely the timeliness holding rendered by this Court in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939).[23] But the First Circuit also committed an even more basic error. It imposed Rule 59(e) without an examination of the purpose or intended application of the rule, and it thereby applied the rule entirely outside of its intended context. By doing so, the First Circuit in this case became the only court of appeals to apply Rule 59(e) to a request for fees under the Fees Act,[24] a result which would have been avoided if the First Circuit had only analyzed Rule 59(e).

---

factual differences between the cost item of fees and other items of costs. J.A. 101-103. These *factual* differences, however, do not provide *legal* grounds for reading Congress' chosen language that fees shall be awarded "as part of the costs" out of the Fees Act. See 10-18, *supra*. Moreover, as the Eighth Circuit has observed, "the same characteristics relied upon by the *White* court to distinguish fees from costs also distinguish fees from the merits of an action," and thereby require fees to be determined in an independent proceeding. *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, ___-___ (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 13-14).

[23] Although the First Circuit did cite *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), in its opinion below, J.A. 104, the First Circuit made no reference to this Court's holding in *Sprague* that a fee request is "not a request for a modification of the original decree." 307 U.S. at 170. Additionally, the First Circuit was unable to distinguish the fact that a fee determination involves an inquiry which is distinct and independent from the rights adjudicated on the merits. See discussion at 18-25, *supra*.

[24] Every other court of appeals that has confronted the timeliness issue had held that Rule 59(e) does not govern a request for fees under the Fees Act. The Fifth, Sixth and Seventh Circuits, in the course of rejecting Rule 59(e), have held that a request for fees "as part of the costs" under the Fees Act is subject only to Rules 54(d) and 58. See cases cited at 12, *supra*.

The Eighth Circuit has also directly rejected Rule 59(e), holding that a fee request is to be determined in an independent proceeding supplemental to the original proceeding. See discussion at 20, *supra*.

The Ninth Circuit, which has not directly rejected Rule 59(e), nonetheless has held that requests for "attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction." *Williams* v. *Alioto*, 625 F.2d 845, 848 (9th Cir. 1980). See also *Terket* v. *Lund*, 623 F.2d 29, 32-34 (7th Cir. 1980). This proposition, which is consistent with awarding fees "as part of the costs" and also consistent with a determination of fees in an independent proceeding, is wholly at odds with Rule 59(e).

The Fourth Circuit on two occasions has declined to apply Rule 59(e) to a request for fees. In *Fox* v. *Parker*, 626 F.2d 351, 352-353 (4th Cir. 1980), the court rejected the application of Rule 59(e) on the ground that the rule could not be raised for the first time on appeal. More recently, in *Hirschkop* v. *Snead*, 646 F.2d 149 (4th Cir. 1981), *aff'g on other grounds* 475 F.Supp. 59 (E.D.Va. 1979), the Fourth Circuit declined to apply Rule 59(e) although the rule had been used by the trial court to deny a fee request. To the extent that these decisions hold that Rule 59(e) is not jurisdictional and cannot be raised for the first time on appeal, the First Circuit's contrary decision here is in error. On the other hand, if Rule 59(e) in conjunction with Rule 6(b) is considered jurisdictional — see generally *United States* v. *Robinson*, 361 U.S. 220, 228-229 (1960) — then the Fourth Circuit's decisions in *Fox* and *Hirschkop* place it squarely in opposition to Rule 59(e)

Finally, several courts of appeals, in determining the appealability or orders on the merits which do not address fees, have held that there is no final and appealable order until fees have been addressed. See, *e.g.*, *Gurule* v. *Wilson*, 635 F.2d 782 (10th Cir. 1980). These decisions, which are discussed in n.27, *infra*, also are wholly at odds with the application of rule 59(e) to a fee request for the simple reason that there is no final and appealable judgment to which Rule 59(e) can be applied until the matter of fees has already been addressed and resolved.

This nearly unanimous rejection of Rule 59(e) by the courts of appeals is not shared, we concede, among the district courts. Although some trial courts have specifically rejected Rule 59(e), see n.6, *supra*, others have applied it in contexts other than under the Fees Act. See generally the cases cited by the First Circuit below, J.A. 97 n.4. In none of these cases, we hasten to add, did the trial courts look to the origins or purposes of Rule 59(e).

The purpose of Rule 59(e), which was added to the Federal Rules of Civil Procedure in 1946, is set forth in a single sentence in the Advisory Committee Report, 5 F.R.D. 433, 476 (1946):

> "*Subdivision (e).* This subdivision has been added to care for a situation such as that arising in *Boaz* v. *Mutual Life Ins. Co. of New York*, C.C.A. 8th, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry."

Both the situation in *Boaz* and the power asserted in that case provide the context for the proper use of Rule 59(e). Essentially, the situation taken care of was "the absence of express authority [for a trial court] to correct its errors," 146 F.2d at 322, specifically in *Boaz*, the authority to change a dismissal without prejudice to a dismissal with prejudice consistent with defendant's previously filed motion to dismiss. The power asserted was the trial court's "inherent power to correct its error." *Id.* Although the power asserted by the district court was not at that time authorized by the then-existing Federal Rules of Civil Procedure, the Eighth Circuit nonetheless held that the trial "court rightly entertained [defendant's] motion, filed and served two days after the trial, to reconsider and correct the action taken at the close of plaintiff's evidence." *Id.*

Given this original understanding of the purpose of Rule 59(e), the federal courts of appeals have been quite consistent in their view that Rule 59(e) applies only to the reconsideration of matters already considered so that a court may correct an error of law. See generally *Hahn* v. *Becker*, 551 F.2d 741, 745 (7th Cir. 1977) [defendant's post-judgment motion, which was labeled a Motion to Set Aside Judgment, actually sought the "correction of errors of law" and thus was subject to Rule 59(e)]; *Seshachalam* v. *Creighton University School of Medicine*, 545 F.2d 1147 (8th Cir. 1976), *appeal dismissed on other grounds*, 549 F.2d 79 (8th Cir.), *cert. denied*, 433 U.S. 909 (1977) [a motion "entitled a motion for reconsideration" which "drew into question the correctness of the judgment" was "functionally a motion under Fed. R. Civ. P. 59(e)"];

Morgan Guaranty Trust Co. v. *Third National Bank*, 545 F.2d 758, 759-760 (1st Cir. 1976) [plaintiff's "motion to amend the district court's allegedly faulty interest order" which addressed matters that "had been considered" by the court was subject to Rule 59(e) because, "[i]f there was a mistake, it was . . . based on an erroneous interpretation of the law"]; *Sack* v. *Low*, 478 F.2d 360, 363 n.1 (2d Cir. 1973) [because "the short time limit" of Rule 59(e) "implies that the respect in which alteration or amendment is needed should be readily apparent," the rule was inapplicable to a matter not fully before the court at the time judgment was entered]; *Silk* v. *Sandoval*, 435 F.2d 1266, 1268 (1st Cir. 1971) [plaintiff's motion to vacate a dismissal is a motion which "seeks reconsideration of a point of law," and thus is subject to Rule 59(e)]; *Maryland Tuna Corp.* v. *MS Benares*, 429 F.2d 307, 318 (2d Cir. 1970) [the "effect" of a Rule 59(e) motion "is to draw into question the correctness of the judgment to which it relates. It is the functional equivalent of a motion for new trial at common law or a motion for a rehearing in suits in equity before the merger brought about by the Federal Rules of Civil Procedure"].[25]

In other words, a Rule 59(e) motion, like several other post-judgment motions governed by 10-day limitations, basically is a motion for rehearing or reconsideration. Within

---

[25] See also *Hauben* v. *Harmon*, 605 F.2d 920 (5th Cir. 1979); *United States* v. *2,186.63 Acres of Land, Wasatch County, Utah*, 464 F.2d 676 (10th Cir. 1972); *Consor* v. *Occidental Life Insurance Co. of Calif.*, 469 F.Supp. 1110, 1118 (N.D.Tex. 1979); *Chil-Mil Corp.* v. *W.T. Grant Co.*, 422 F.Supp. 46, 48 (E.D.Wis. 1976); *U.S. ex rel. Rosner* v. *Comm'r, N.Y.S.D. of Corr.*, 421 F.Supp. 781, 793 (S.D.N.Y. 1976), *modified*, 560 F.2d 84 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977); *American Family Life Assur. Co.* v. *Planned Marketing Assoc., Inc.*, 389 F.Supp. 1141, 1144 (E.D.Va. 1974); *Tucker* v. *Reading Co.*, 335 F.Supp. 1269 (E.D.Pa. 1971); *Continental Cas. Co.* v. *American Fidelity & Cas. Co.*, 186 F.Supp. 173, 178 (S.D.Ill. 1959), *aff'd*, 275 F.2d 381 (7th Cir. 1960); *Rodgers* v. *Conemough & Black Lick R.R. Co.*, 137 F.Supp. 467 (W.D.Pa. 1956).

this category of post-judgment motions are a Rule 50(b) motion for judgment notwithstanding the verdict, which may be made by a party who previously had moved for a directed verdict; a Rule 52(b) motion to amend a court's findings and judgment; a Rule 59(b) motion for a new trial; and a Rule 59(e) motion to alter or amend a judgment. Because each of these motions is directed at matters which previously were presented to a court but on which the court allegedly ruled erroneously, all of the motions are appropriate to be governed by, and they all are governed by, 10-day time limitations. These time limitations cannot be enlarged under Rule 6(b) of the Fed. Civ. P. And, under Rule 4(a)(4) of the Fed. R. App. P., the motions toll the time for filing a notice of appeal.[26]

The interrelated nature of these 10-day motions and their characterization as motions for rehearing or reconsideration are familiar subjects in this Court. In *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978) — a case which involved issues of finality, appealability, and the applicability of Rule 52(b) and 59(e) to habeas corpus proceedings — the Court repeatedly referred to those rules as motions for "rehearing" or "reconsideration." 434 U.S. at 266, 268, 271. And, the Court reminded us, "the timeliness of a motion for rehearing or reconsideration is governed by Rule 52(b) or Rule 59, each of which allows only 10 days." 434 U.S. at 268.

Of similar import is *United States* v. *Dieter*, 429 U.S. 6 (1976), another case which involved the effect of a motion allegedly for reconsideration. Although the motion there was not captioned a motion for rehearing or reconsideration, the Court held that there was "no doubt that in purpose and effect

---

[26] Because of this impact, the 10-day motions often are distinguished from a Rule 60(b) motion, which may be filed in some instances "within a reasonable time" and in other instances "not more than one year after the judgment," and which "does not affect the finality of judgment or suspend its operation." Fed. R. Civ. P. Rule 60(b).

it was precisely that, asking the District Court to 'reconsider [a] question decided in the case' in order to effect an alteration of the rights adjudicated," and that the motion accordingly rendered "the original judgment nonfinal for purposes of appeal." 429 U.S. at 8-9 (brackets by the Court), quoting from *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942). Similarly, the Court in *Pink* distinguished between a motion for rehearing, which tolls the time for appeal, and a motion not seeking reconsideration of a question already decided, which does not toll the time for appeal. Observing that the motion at issue "did not seek to have the [lower court] reconsider any question decided in the case," 317 U.S. at 266, the Court held that the motion was not a motion for reconsideration and that its filing thus had not tolled the time for appeal.

The foregoing characterizations of motions for rehearing or reconsideration of matters previously submitted to a court apply with precision to rule 59(e). In fact, the express purpose of Rule 59(e) — based on the Advisory Committee's incorporation of the decision in *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944) — is to permit reconsideration of matters already submitted so that a court can correct a previous error of law.

A request for attorney's fees simply does not fit this mold. It does not seek reconsideration of matters previously presented, nor does it seek to correct a mistake of law addressed in the judgment on the merits. As the Fifth Circuit succinctly summarized, a request "for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)." *Knighton* v. *Watkins*, 616 F.2d 795, 797 (5th Cir. 1980).

Although an inquiry into the reason for the First Circuit's misapplication of rule 59(e) is not directly relevant here, the Eighth Circuit has suggested that the First Circuit's decision was caused by its excessive concern about piecemeal appeals:

"This concern seems to pervade the entire opinion and might be regarded as the primary rationale of the decision." *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, ___ n.8 (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 14 n.8).

The answer to appellate court worries about piecemeal appeals,[27] however, is not found in the erroneous application of Rule 59(e) to a request for fees. A more appropriate answer — which doesn't involve the misapplication of Rule 59(e) — is

---

[27] It should be pointed out that several courts of appeals — concerned about piecemeal appeals in the context of deciding appealability issues — have rendered decisions which are diametrically opposed to the First Circuit's decision here because they directly bar the application of Rule 59(e) to a fee request. Specifically, in determining the appealability of orders on the merits which do not address fees (at least in cases where fees were requested in the pleadings), several courts of appeals have held that there is no final and appealable order until the question of fees has been addressed. *See, e.g., Gurule* v. *Wilson*, 635 F.2d 782 (10th Cir. 1980); *Johnson* v. *University of Bridgeport*, 629 F.2d 828 (2d Cir. 1980); *Richerson* v. *Jones*, 551 F.2d 918 (3d Cir. 1977). Under these decisions there is no final judgment to which Rule 59(e) can be applied until a fee request has been submitted and determined.

The correctness of the position taken by these courts of appeals on this appealability issue has not been conclusively resolved by this Court. Support for the position is found in *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742 (1976), where this Court, in holding a liability judgment nonfinal and unappealable, observed that plaintiffs had "requested an injunction, but did not get one; they requested damages, but were not awarded any; they requested attorneys' fees but received none." See also *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 479-480 n.5 (1980).

At the same time, there is considerable authority rejecting this approach. See, *e.g., Terket* v. *Lund*, 623 F.2d 29 (7th Cir. 1980), *Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980); *Swanson* v. *American Consumer Industries Inc.*, 517 F.2d 555 (7th Cir. 1975); see also, *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___ (8th Cir. June 11, 1981) (No. 80-1315), *prospectively*

the approach adopted by the Seventh Circuit in *Terket* v. *Lund*, 623 F.2d 29 (7th Cir. 1980) (holding that a separate notice of appeal must be filed from the distinct and independent order awarding fees). There the Seventh Circuit directed that "district courts in this circuit should proceed with attorney's fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisified with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits." 623 F.2d at 34 (footnote omitted). In fact, under Rule 3(b) of the Fed. R. App. P., "[a]ppeals may be consolidated by order of the court of appeals upon its motion."

Aside from this better perspective on appealability and from the fact that the application of Rule 59(e) to a request for fees is erroneous as a matter of law, the First Circuit's 10-day rule is entirely uneconomical and contrary to sound judicial policy because of the problems it creates for trial courts and litigants alike.[28] The court's 10-day rule virtually assures fewer settle-

---

overruling 623 F.2d 521 (8th Cir. 1980). In fact, as Justice Rehnquist observed in his dissenting opinion in *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 482-489 (1980), the separate appealability of decisions on the merits and of awards of fees dates back at least to *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), presaged in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), and indeed in *Trustees* v. *Greenough*, 105 U.S. 527 (1882).

Although appealability is not at issue here, both lines of cases preclude the application of Rule 59(e) to a request for fees.

[28] Although the First Circuit was of the view that its 10-day rule would be "more economical of a court's time," J.A. 105, the court did not at all explore the many less economical ramifications that flow from its decision. Some of these ramifications, which "result in a less economical use of judicial resources," were explored by the Eighth Circuit in *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, ___ n.8 (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 14 n.8), where the court pointed out that fee requests would have to be filed after every final order thereby causing

ments and greater docket congestion. Rather than being settled on the merits, cases will be forced to trial and decision. And rather than allowing time for fee settlements after the entry of judgment, the First Circuit's decision requires fee applications to be filed immediately for resolution by the courts.

The impact of the First Circuit's decision on settlements is a real one. With fees required to be negotiated at the same time as the merits of a case — a procedure which the First Circuit formally endorsed, J.A. 106 — class counsel invariably will be asked by their adversaries to accept less for their clients or less for themselves. Acceptance of the former is unethical.[29] Acceptance of the latter is both unrealistic and contrary to the express purposes of the Fees Act.[30] The obvious result is that cases which could be settled on the merits will instead go to trial.

"fragmentation of the same litigation" solely over fees, that the shortness of the 10-day period would make out-of-court fee settlements virtually impossible, and that the "First Circuit's procedure may force an appeal of the entire case where the sole issue of concern to the appellant may be the propriety or size of the attorney's fees award."

[29] The mere possibility of a sweetheart settlement — "[w]e cannot indiscriminately assume, without more, that the amount of fees have [sic] no influence on the ultimate settlement obtained for the class when, along with the substantive remedy issues, it is an active element of negotiation" — led the Ninth Circuit to conclude, as noted hereafter, that it "would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place." *Mendoza* v. *United States*, 623 F.2d 1338, 1352-1353 (9th Cir. 1980).

The ethical problems imposed by the First Circuit's 10-day rule are set forth more fully at 37-41, *infra*.

[30] Not only did Congress state that it was "proper to award counsel fees" where the substantive litigation "terminates by consent decree," and that counsel "should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion," H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976), but the ex-

The First Circuit's decision also removes from the negotiation tables most post-judgment fee requests. Because of the First Circuit's 10-day limitation, counsel for the prevailing parties will have to prepare and serve within 10 days: a fee application, time records and affidavits in support thereof, affidavits addressing counsel's hourly rates as well as the various contingency factors and quality factors relevant to fee computation, and a supporting brief.[31] No time can be lost attempting to negotiate a settlement concerning the availability or amount of fees. Instead, all fee requests will have to be filed with the courts. And once the applications have been

---

press purpose of the Act is to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." *Id.* at 9. Without the prospect of reasonable fee awards, lawyers will decline to represent those whose rights have been violated. This would then reflect the situation that Congress described at the time it enacted the Fees Act:

> "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Fees Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." *Id.* at 1.

Contrary to the intent of Congress, the First Circuit here suggested that counsel might be willing to "waive fees altogether," J.A. 107; encouraged their adversaries in any event to negotiate a fee waiver in return for relief for the class; and, indeed, turned the availability of fees for successful counsel into a procedural nightmare. In short, the First Circuit has negated the very purposes of the Fees Act.

[31] The First Circuit, like all other courts of appeals, requires extensive documentation in support of a fee application. See *Souza* v. *Southworth*, 564 F.2d 609 (1st Cir. 1977); *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). These requirements cannot be taken lightly, for the burden is on the movant lawyers to prove entitlement to a fee award. *Id.*; see also, *Nadeau* v. *Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978).

submitted, with the positions of counsel having hardened, most applications of necessity will have to be resolved by the courts. The result, again, is fewer settlements and more docket congestion.

In addition to its effect of discouraging settlements, the First Circuit's decision plays havoc with appellate procedures and actually increases the number of fee applications that will be filed. Since final judgments on the merits would be suspended by the filing of fee requests, both injunctive relief and appeals on the merits will often be delayed. The former is contrary to this Court's decision in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974), which held that it would be "undesirable to delay" the implementation of injunctive relief "in order to resolve the question of fees simultaneously." The latter is contrary to the allowance and resolution of appeals on the merits — which sometimes result in a reversal on the merits — before fee applications are even filed. See generally *Perkins* v. *Standard Oil Co. of California*, 399 U.S. 222 (1970); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). Moreover, since "many final orders may issue in the course of the litigation," *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974), parties who prevail would have to file separate fee applications within 10 days of every such final order rather than awaiting the conclusion of the entire litigation.

As these considerable problems, indicate, the application of Rule 59(e) to a request for fees is unwise as a matter of policy. More basically, it is erroneous as a matter of law. Rule 59(e) was designed to authorize the power asserted in *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F.2d 321, 322 (8th Cir. 1944): the power "to reconsider and correct" a judgment, the power of a court "to correct its errors." As such, Rule 59(e) cannot and does not apply to the entirely new matters raised by a request for fees.

II. A Court May Not Require Simultaneous Negotiation Of The Merits And Of Fees In A Class Action Lawsuit Because Of The Ethical Conflicts Thereby Imposed On Class Counsel

By erroneously applying Rule 59(e) to a request for fees, and thereby allowing no time for the settlement of fees after resolution of the merits, the First Circuit below erred in yet another way. It held that, in a "consent decree context," it could *not* find "anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations," J.A. 106, *i.e.*, in their negotiations on the merits. Perceiving no ethical conflict in counsel's own very real interest in the fee award, the First Circuit even added that it did not mean to "suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree." J.A. 107.

What is manifestly wrong about the First Circuit's decision is the very real ethical problem it imposes upon counsel, especially class counsel.[32] Also wrong is one of the remedies suggested by the First Circuit for the ethical problem it imposed: that counsel for prevailing parties "may, of course, decide to waive fees altogether," J.A. 107, a proposition which is directly at variance with the purposes of the Fees Act.

---

[32] The First Circuit's rule imposes ethical conflicts on both non-class counsel and class counsel. The conflict imposed on class counsel is greater, however, because class counsel must maintain on behalf of the representative plaintiffs a special trust relationship with the absent class. Simultaneous negotiation of the merits of a class action and of fees can be viewed as a breach of that trust relationship sufficient to deny class certification. *Munoz* v. *Arizona State University*, 80 F.R.D. 670, 671-672 (D.Ariz. 1978); *Lyon* v. *State of Arizona*, 80 F.R.D. 665, 669 (D.Ariz. 1978).

This case, as noted in the Statement of the Case at 2, *supra*, was certified as a class action. J.A. 1-2, 93.

Finally, the First Circuit's rule favoring simultaneous negotiation also is inconsistent with the decisions of this Court.

The ethical dilemma imposed by the First Circuit arises from the fact that counsel themselves, although responsible for advancing the interests of their clients, have a very real interest of their own in the fee award. The nature of this conflict was aptly described, in the course of discouraging simultaneous negotiation, in *Regaldo* v. *Johnson*, 79 F.R.D. 447, 451 (N.D.Ill. 1978) (citation omitted):

> "Everyone familiar with civil rights litigation knows that a plaintiff in such suits rarely pays attorney's fees or the costs of litigation. For these reasons, a motion for fees and costs in such a case, although made in the name of the plaintiff, is really one by the attorney. This interest in the fee makes it improper for the lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions."

Recognizing the seriousness of this conflict, two courts of appeals, the Third and Ninth Circuits, have now adopted rules strongly discouraging the simultaneous negotiation of a substantive judgment on the merits and of the availability or amount of fees. The Third Circuit's ironclad view is set forth in *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977), where the court required avoidance of such ethical conflicts by directing "trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees." The Ninth Circuit, in *Mendoza* v. *United States*, 623 F.2d 1338, 1352-1353 (9th Cir. 1980), agreed, initially observing that the conflicts do not disappear where "there is no fund or money damages being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict between class counsel and members of the class remains." Since it "would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place," the Ninth Circuit concluded: "we strongly discourage the simultaneous ne-

gotiation of attorneys fees and substantive issues in class action settlement negotiations." *Id.*[33]

The ethical conflict imposed by the First Circuit not only is apparent from the law but also was expressly conceded by respondents' counsel in the trial court. As pointed out in nn.1&2 *supra*, respondents' counsel stated as his "opinion" that: "I should not be holding the consent [decree] hostage to attorney's fees because I might have an ethical problem." J.A. 69. Stated otherwise, "if you hold or require an attorney in this situation to forego or withhold attorneys' fees in order for his clients to get what they wanted in the first place, from what I have read there is an ethical problem here." J.A. 88.[34]

Disregarding *Prandini* and *Mendoza*, the ethical problem itself, and the admissions by counsel for the respondents in this case, the First Circuit suggested as one possible solution that counsel could simply "waive fees altogether." J.A. 107.

---

[33] Several other courts of appeals have recognized this conflict of interest problem but have not had occasion to rule on the ethical question posed by simultaneous negotiation. See, *e.g.*, *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 503 n.1 (5th Cir. 1981); *Shelton* v. *Pargo, Inc.*, 582 F.2d 1298, 1315 (4th Cir. 1978); *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 425-426 (7th Cir. 1977).

[34] Prior to the ruling by the First Circuit here, counsel in other cases — like counsel here — increasingly recognized the ethical issue involved and thus postponed any discussion of fees until after resolution of the merits. See *e.g.*, *Chrapliwy* v. *Uniroyal, Inc.*, 509 F.Supp. 442, 448 (N.D.Ind. 1981); *Williams* v. *Ryan*, 78 F.R.D. 364, 369 (S.D.Ga. 1978). This, in fact, is precisely what occurred between counsel in *Maher* v. *Gagne*, 448 U.S. 122 (1980). See also the cases cited in n.8, *supra*.

Since respondents' counsel here — like defense counsel in the foregoing cases — incurred no credible suprise with regard to the subsequent request for attorney's fees, respondents' argument in the First Circuit below that the consent decree on the merits should be vacated, J.A. 95, is wholly without merit.

This proposal, however, is directly contrary to the express purpose of the Fees Act, which is to provide a financial incentive for counsel to represent non-fee-paying clients whose civil rights have been violated See n.30, *supra*. Additionally, the First Circuit's suggestion is squarely opposed by that part of the House Report accompanyaing the Fees Act which initially observes that, "if the litigation terminates by consent decree, for example, it would be proper to award counsel fees," and thereafter emphasizes that counsel "*should not be penalized for seeking an out of court settlement*, thus helping to lessen docket congestion." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976) (emphasis added). See also *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980), where this Court — in upholding an award of counsel fees rendered after the parties had reached a consent decree on the merits — relied on the virtually identical language in S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976).

The First Circuit's approval of concurrent consideration of the merits and of fees also is inconsistent with this Court's decision in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974). After initially observing in *Bradley* that "the resolution of the fee issue may be a matter of some complexity and require, as here, the taking of evidence and briefing," this Court held that it would have been undesirable for the trial court to "delay the implementation of a desegregation plan in order to resolve the question of fees simultaneously. The District Court properly chose not to address itself to the question of the award until after it had approved the non-interim plan for achievement of the unitary school system." 416 U.S. at 723. In the same manner, it is undesirable to discourage a settlement on the merits in order to force an attempted resolution of the question of fees simultaneously. And, where the settlement resolves the merits but does not address fees, it again is incorrect to suspend that judgment on the merits in order to then resolve the question of fees simultaneously. But that is precisely the result achieved by holding that a fee request is subject to Rule 59(e), a rule that never

was intended to apply to a fee request which, by its very nature, does not seek reconsideration of an error of law allegedly committed by a court in rendering a judgment on the merits with regard to matters previously submitted.

CONCLUSION

For the foregoing reasons, the decision of the First Circuit should be reversed.

Respectfully submitted,

E. RICHARD LARSON*
BRUCE J. ENNIS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

RAYMOND J. KELLY
922 Elm Street
Manchester, N.H. 03101
(603) 669-7603

ALAN LINDER
ALAN CRONHEIM
New Hampshire Legal Assistance
136 North Main Street
Concord, N.H. 03301
(603) 224-3333

Counsel for Petitioner
**Counsel of Record*

APPENDIX

APPENDIX

STATUTES AND RULES INVOLVED

This federal statute involved in this case is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended, which provides in pertinent part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], Title IX of Public Law 92-318 [Title IX of the Education Amendments of 1972, Sections 1681-1686 of U.S.C. Title 20] . . . or Title VI of the Civil Rights Act of 1964 [Sections 2000d, *et seq.*, of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case also involves Rules 54(b), 54(d), 58 and 59(e) of the Fed. R. Civ. P., which provide in whole or pertinent part:

Rule 54(b)

> *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 54(d)

> *Costs.* Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing

party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 58

Entry of Judgment . . . Entry of the judgment shall not be delayed for the taxing of costs.

Rule 59(e)

Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.